GULAM WAWASAN SDN BHD
v. KERAJAAN MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
COLLIN LAWRENCE SEQUERAH JCA
ALWI ABDUL WAHAB JCA
SHAHNAZ SULAIMAN JCA
[CIVIL APPEAL NO: W-01(NCvC)(W)-180-03-2024]
21 NOVEMBER 2025

Abstract – *(i) A statutory body or its officers are bound by the scope of functions defined by their enabling Act. Where an entity is tasked with carrying out Government policy, it lacks the autonomous power to unilaterally approve financial increases without the express approval of the Executive; (ii) When a party voluntarily enters into a contract at a specific rate, they cannot later claim 'discrimination' if other contractors negotiated better rates. Price negotiations between private or privatised parties are matters of private law, and the courts will not interfere with a bad bargain under the guise of constitutional rights; (iii) A public officer who acts in accordance with the terms of an agreement and follows procedural protocols cannot be said to have committed a tortious act. Administrative decisions made based on contractual limitations do not constitute a 'failure to act' or 'deliberate neglect'.*

CONTRACT: *Agreement – Concession agreement – Novation – Quantum meruit – Service provider and city council entered into contract for provision of cleaning services for footways of city – Contract novated following privatisation of management of solid waste and public cleansing – Claim for outstanding sums allegedly due for services rendered by service provider to city council – Expectation of entitlement as compared to what other contractors received under concession agreement – Whether there was privity of contract – Whether there was unfair discrimination – Contracts Act 1950, s. 71*

TORT: *Misfeasance – Misfeasance in public office – Service provider and city council entered into contract for provision of cleaning services for footways of city – Contract novated following privatisation of management of solid waste and public cleansing – Claim for outstanding sums allegedly due for services rendered by service provider to city council – Whether misfeasance in public office established*

LOCAL GOVERNMENT: *City council – Service provider and city council entered into contract for provision of cleaning services for footways of city – Contract novated following privatisation of management of solid waste and public cleansing – Claim for outstanding sums allegedly due for services rendered by service provider to city council – Expectation of entitlement as compared to what other contractors received under concession agreement – Whether there was unfair discrimination – Whether there was tort of misfeasance in public office – Solid Waste and Public Cleansing Management Act 2007*

The appellant was awarded a contract on 15 April 2005 by the Dewan Bandaraya Kuala Lumpur ('DBKL') for cleaning footways in Kuala Lumpur. On 1 September 2011, the Solid Waste and Public Cleansing Management Act 2007 ('Act') came into force, which led to the establishment of a centralised executive authority over solid waste management to the Federal Government ('first respondent'), which was previously held by local authorities. This responsibility was then delegated to the Ministry of Housing and Local Government ('second respondent'), led at the time by the fourth respondent as its secretary general. The Act also led to the establishment of Jabatan Pengurusan Sisa Pepejal Negara ('third respondent'), led by the Director General and the Solid Waste and Public Cleansing Management Corporation ('sixth respondent'), a corporate body overseen by the second respondent and led by a chief executive officer ('fifth respondent'). Pursuant to this privatisation policy, the first and sixth respondents and Alam Flora Sdn Bhd ('AFSB') entered into a concession agreement on 19 September 2011, resulting in the novation of the appellant's original contract with DBKL to AFSB. On 10 October 2012, AFSB and the appellant signed a letter of award where the appellant accepted a new contract but the payment rate remained the same. For the period between 2013 and 2018, the appellant made repeated appeals directly to the Prime Minister and ministers, bypassing the AFSB. The then-Prime Minister minuted several letters with remarks like 'For consideration' and later instructions to implement a new price. On 1 August 2014, the third respondent issued an internal letter approving a price rate increase. The fourth respondent chaired a meeting on the appellant's appeals. The meeting concluded that rate changes could only be considered in 2018 and required broader agreement, not unilateral approval. In a meeting with the Minister, it was decided that any price increase must go to the Cabinet for approval as the appellant's work fell outside the scope of the concession. The then Prime Minister, on 18 April 2018, minuted a letter with a directive 'New price approved … No need to bring to Cabinet.' Parliament was then dissolved for a general election before the directive could be acted upon. In 2019, the fourth respondent wrote to the new Prime Minister but the new position was that Cabinet approval was required. The appellant claimed against (i) the six respondents at the High Court for alleged breach of contract and for unequal treatments with other contractors; and (ii) the fourth respondent for tort of misfeasance in public office. The High Court dismissed the claim. Hence, the present appeal. The appellant contended that: (i) the first respondent had been unjustly enriched by the appellant's services. Even though there was direct contract between the appellant and the respondents, the respondents were obligated to pay reasonable compensation to the appellant; (ii) the respondents discriminated against the appellant by granting price increases to all other contractors providing similar public cleansing services but denying one to the appellant, without any justification; and (iii) the fourth respondent, as a senior public

officer, had committed the tort of misfeasance in public office by deliberately and unlawfully failing to perform his duty to table the appellant's price increase to the Cabinet for consideration and approval.

Held (dismissing appeal)
Per Shahnaz Sulaiman JCA delivering the judgment of the court:

(1a) Based on s. 17 of the Act, which provides for the functions of the sixth respondent, the scope of duty or function of the fifth and sixth respondents were limited by the Act. Hence, the fifth and sixth respondents carried out the policies of the first respondent. The fifth and sixth respondents were not autonomous and were required to obtain the first respondent's approval for any increase in price. In other words, it was not for the fifth and sixth respondents to decide on any price increase for the services rendered. (paras 85 & 86)

(1b) In relation to the first to fourth respondents, the appellant had relied on s. 71 of the Contracts Act 1950 ('CA') and/or *quantum meruit*. There were no outstanding payments from AFSB to the appellant. All payments were made either by AFSB or DBKL themselves, to whom the principle of the 'corporate veil' applied and, as a consequence, did not bind the first to fourth respondents. DBKL and AFSB, being distinct and separate entities, were the ones who had received the benefits from the cleaning works performed by the appellant. This ground of appeal, namely s. 71 of the CA and/or *quantum meruit*, did not have merit. (paras 87, 88 & 90)

(2) The service fee received by the appellant was one that it had voluntarily agreed to when it signed the letter of award with AFSB. The contractual terms were mutually agreed upon by both parties under s. 10 of the CA. How then could the appellant contend that there was discrimination when the subject matter of this appeal, namely the price increase, was a matter between the appellant and AFSB, which constituted a matter of personal law not subject to art. 8 of the Federal Constitution ('FC'). There was no evidence that the respondents had, at any time, violated the appellant's constitutional rights under the FC. Moreover, with respect to the rate increases for other companies, such increases were made by AFSB, as reflected in letters dated 15 April 2013. (paras 106-108)

(3a) There was no evidence to suggest that the fourth respondent engaged in any act of malice towards the appellant. The fourth respondent did not possess any personal interest, ill will or ulterior motive to cause harm to the appellant or its company. On the contrary, the fourth respondent's actions were undertaken strictly in accordance with the terms of the concession agreement. Under the concession agreement,

A the right to apply for price revisions was expressly limited to the contracting parties to the concession agreement. The appellant was not a party to the concession agreement. Accordingly, the fourth respondent's conduct was consistent with his obligations and authority, rather than driven by any improper or malicious intent. (para 124)

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(3b) The name of the fourth respondent appeared in the minutes of a letter dated 20 October 2015, which had been sent to him by the Prime Minister's Political Secretary. The minute read '... untuk dilaksanakan pembayaran harga baru mulai September 2012, seperti C syarikat-syarikat lain'. Following this, the fourth respondent chaired a meeting on 3 November 2015, during which it was decided that any changes to the rates could only be implemented in 2018 as no revisions had been made prior to that date. It was further resolved that any adjustments to the rates must be mutually agreed upon by the parties D to the concession agreement. Therefore, it would be inaccurate to assert that the fourth respondent failed to take any action. On the contrary, he did act upon the matter. (para 128)

Case(s) referred to:

Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

E *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd [2016] 2 CLJ 563 CA* ***(refd)***

Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd [2014] 5 CLJ 533 CA ***(refd)***

CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 6 CLJ 471 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

F *GDP Architects Sdn Bhd v. Universiti Teknologi Mara [2016] CLJU 1321; [2016] 1 LNS 1321 HC* ***(refd)***

GPQ Sdn Bhd v. Constant View Sdn Bhd [2017] CLJU 821; [2017] 1 LNS 821 CA ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Northern Territory Of Australia v. Mengel [1995] 185 CLR 301 ***(refd)***

G *Odhavji Estate v. Woodhouse [2003] 3 SCR 263* ***(refd)***

Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors [2014] 4 CLJ 393 CA ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] CLJU 161; [1967] 1 LNS 161 ***(refd)***

Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(refd)***

H *Suwiri Sdn Bhd v. Government Of The State Of Sabah [2008] 1 CLJ 123 FC* ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

Three Rivers District Council v. Bank Of England [2003] 2 AC 1 ***(refd)***

Three Rivers District Council & Ors v. Bank Of England (No 3) [2000] 3 All ER 1 ***(refd)***

Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(refd)***

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Legislation referred to:
Contracts Act 1950, ss. 10, 71
Federal Constitution, arts. 8(2), (5), 132(1)(c)
Government Proceedings Act 1956, s. 5
Solid Waste and Public Cleansing Management Act 2007, ss. 17, 19(1)

For the appellant - Cyrus Das, Muhammad Azrul Abdul Hamid & Mahitra P Subramaniam; M/s Azrul, Liew & Co
For the 1st-4th respondents - Norhaina Zulkifli; SFC
For the 5th & 6th respondents - Khairul Aiman Kamar Rozaman; M/s Mohamed Noor, Amran & Yoon

[Editor's note: For the High Court judgment, please see Gulam Wawasan Sdn Bhd v. Government Of Malaysia & Ors [2024] 7 CLJ 123 (affirmed).]

Reported by Lina E

JUDGMENT

Shahnaz Sulaiman JCA:

Introduction

[1] This appeal arises from the decision of the learned Judicial Commissioner delivered on 15 February 2024, which dismissed the appellant's claims against all six respondents. The dispute concerned an alleged breach of contract between the appellant and the respondents and for unequal treatments with other contractors, whose contracts with the City Hall of Kuala Lumpur ("DBKL"), had been novated to a new concessionaire, Alam Flora Sdn Bhd ("AFSB"). The appellant also makes a claim of a tort of misfeasance in public office against the fourth respondent, as a senior public officer, for his failure to table the appellant's price increase to the Cabinet for consideration and approval.

[2] Having heard comprehensive submissions from all parties and carefully considered the evidence and the High Court's reasoning, we unanimously dismiss the appeal with costs. The analysis of the learned Judicial Commissioner was legally sound, factually well-grounded, and his conclusions were amply supported by the evidence before him.

Background Facts

[3] The appellant was awarded a contract on 15 April 2005 by DBKL for cleaning footways in Kuala Lumpur. The terms stipulated specific cleaning frequencies and rates for various streets that was calculated on a per-square-metre basis. This agreement was later extended for a further five years following a decision by the Economic Planning Unit on 14 November 2007.

[4] On 1 September 2011, the enacted Solid Waste and Public Cleansing Management Act 2007 (Act 672) came into force, which led to the establishment of a centralised executive authority over solid waste management to the Federal Government (the first respondent) which was

previously held by Local Authorities. This responsibility was then delegated to the Ministry of Housing and Local Government (the second respondent), led at the time by the fourth respondent as its secretary general. Act 672 also led to the establishment of key entities, namely, the third respondent, Jabatan Pengurusan Sisa Pepejal Negara, led by a Director General, and the sixth respondent, Solid Waste and Public Cleansing Management Corporation, a corporate body overseen by the second respondent and led by a Chief Executive Officer (the fifth respondent).

[5] Pursuant to this privatisation policy, the first respondent, the sixth respondent, and AFSB entered into a concession agreement on 19 September 2011. This resulted in the novation of the appellant's original contract with DBKL to AFSB.

[6] The detailed chronology of events is as follows. On 15 April 2005, the appellant was awarded a contract by DBKL and began providing footway cleaning services in Kuala Lumpur at a fixed rate. On 14 November 2007, instructions by Economic Planning Unit were given to DBKL, resulting in the appellant's contract being extended for a further five years.

[7] On 1 September 2011, the Act 672 came into force and the authority for waste management was centralised under the first respondent.

[8] The concession agreement was signed on 19 September 2011 between the first respondent, the sixth respondent and AFSB. The appellant's contract with DBKL was novated to AFSB as part of the national privatisation initiative.

[9] Negotiations between appellant and AFSB took place between September 2011 and October 2012. The appellant initially disagreed with the novation, and DBKL continued payments during this period.

[10] Subsequently, on 10 October 2012, AFSB and the appellant signed a letter of award where the appellant accepted a new contract but crucially, the payment rate remained the same as the 2005 rate.

[11] For the period between 2013 to 2018, the appellant made repeated appeals directly to the Prime Minister and ministers, bypassing AFSB. The then – Prime Minister minuted several letters with remarks like "For consideration" and later instructions to implement a new price.

[12] On 1 August 2014, the third respondent issued an internal letter approving a price rate increase. On 3 November 2015, the fourth respondent chaired a meeting on the appellant's appeals. The meeting concluded rate changes can only be considered in 2018 and required broader agreement, not unilateral approval.

[13] A meeting convened by the Minister (YB Tan Sri Noh Omar) on 29 March 2017 decided that any price increase must go to the Cabinet for approval as the appellant's work falls outside the scope of the concession. The then Prime Minister on 18 April 2018, minuted a letter with a directive: "New price approved ... No need to bring to Cabinet". Parliament was then dissolved for a general election before the directive could be acted upon.

[14] In 2019, the fourth respondent wrote to the new Prime Minister, Tun Dr Mahathir Mohamed. The new position was that Cabinet approval is required. On 15 February 2024, the High Court dismissed the appellant's claim in its entirety.

Proceedings At High Court

[15] The appellant's complaint against the respondents at the High Court consists of three causes of action. Firstly, a claim under s. 71 of the Contracts Act 1950 and/or *quantum meruit* against the first respondent on the ground that the first respondent had ultimately benefited from the appellant's services for which the appellant has not been adequately compensated compared to other contractors following the novation of its contract with DBKL to AFSB. Second, the appellant's claim of unfair discrimination is based on its cause of action under art. 8(2) of the Federal Constitution in that it has not been treated equally regarding compensation as compared to other contractors providing similar services. Third, the appellant filed a claim under the tort of misfeasance and/or nonfeasance in public office against the fourth respondent, which renders the first respondent vicariously liable for the conduct of the fourth respondent, who failed to take proper, reasonable and expected course of action in addressing the appellant's requests and appeals for the price increase.

[16] This being the case, the appellant sought the following reliefs against the respondents at the High Court on a joint and several basis or on an alternative liability bases as reproduced below:

(a) the Respondents, whether jointly or severally, shall pay the outstanding amount of RM85,356,734.98, the outstanding balance of all the amounts owing for the services rendered by the Appellant to the Respondents or any of them from the date of this suit until judgment or such sum as the court deems fit;

(b) in the alternative to para. (a) above, the Respondents, whether jointly or severally, shall pay the outstanding amount of RM62,129,038.53, the outstanding balance of all the amounts owing for the services rendered by the Appellant to the Respondents or any of them from the date of this suit until judgment or such sum as the court deems fit;

(c) as a further alternative to paras. (a) and (b) above, compensation for a sum that the court deems fit and just in accordance with s. 71 of the Contracts Act 1950;

A (d) interest in accordance with the Rules of Court 2012, the terms in the relevant letters or such other rate or period as the court may deem appropriate;

(e) general damages;

(f) exemplary damages;

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(g) costs; and

(h) further and/or other relief as the court may deem fit and just.

The High Court's Decision

C **[17]** The learned Judicial Commissioner delivered a comprehensive judgment addressing all the key issues raised by the parties. His principal findings may be summarised as follows:

(i) the appellant was not a party to the concession agreement executed between the first respondent and the sixth respondent. This fact D unequivocally demonstrates a lack of privity of contract between the appellant and the first respondent. The appellant's position is further compromised as it falls entirely outside the jurisdictional scope of the concession agreement and is a stranger to its terms. Crucially, even if the concession agreement were invoked, it expressly stipulates that no E privity of contract is created between the first respondent and any of AFSB's contractors. The High Court found that the respondents, particularly the first respondent did not engage in any unconscionable conduct towards the appellant that resulted in unjust enrichment. There existed no legal relationship whatsoever between the appellant and the first to fourth respondents;

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(ii) the appellant's claim under *quantum meruit* is unsustainable. The issue of whether the compensation received by the appellant was sufficient is a distinct matter not governed by s. 71 of the Contracts Act 1950. Given the existence of a valid contract governing the appellant's G relationship with AFSB concerning its services, s. 71 of the Contracts Act 1950 is applicable, thereby precluding a *quantum meruit* claim. The appellant's position is untenable, as it seeks to assert a claim against the first respondent without a contract, while simultaneously relying upon and having been compensated pursuant to its ongoing contractual relationship with AFSB;

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(iii) the appellant's cause of action alleging unfair discrimination must fail. The evidence established that the appellant voluntarily entered into a valid and binding contract with AFSB. Despite initial reservations, the appellant ultimately accepted the letter of award with full knowledge I that the pricing for its services remained unchanged from its previous contract. The contractual relationship between the parties is governed

by the Contracts Act 1950 to the exclusion of art. 8(2) of the Federal Constitution. The High Court found no infringement of the appellant's constitutional rights, as this is a matter of private contractual law. There was neither discrimination nor any element of unfairness in the respondents' conduct;

(iv) the appellant had failed to establish a case of misfeasance in public office against the fourth respondent. The appellant did not adhere to the proper procedure for requesting a price increase, which would have required it to address the issue directly with AFSB, who would then engage with the sixth respondent. The appellant's decision to bypass its contractual chain and engage directly with the Prime Minister was an inappropriate course of action, as it deprived the Prime Minister of the necessary context and background information. Furthermore, the appellant's letters to the Prime Minister failed to adequately explain the legal and contractual relationships between the parties;

(v) the High Court found that the appellant had been fully compensated in accordance with the contract it agreed upon. In light of this, there was no evidence of an intention on the part of the fourth respondent to intentionally injure the appellant through any deliberate or unlawful conduct in the exercise of public functions. The appellant had not demonstrated any bad faith or outrageous conduct by the fourth respondent. Consequently, there is no element of abuse of public power. The fourth respondent's position remained consistent throughout, even under a subsequent administration;

(vi) it is also noteworthy that despite the appellant's allegations of the fourth respondent defying directives, no action for insubordination was ever taken by the Government. The High Court observed that it was the Prime Minister's own view that no Cabinet approval was required. The fourth respondent's advice to the incoming Government was consistent with his long-held position. Any perceived delay in handling the matter did not alter the fact that the official stance remained unchanged which was a position shared by the first to third respondents; and

(vii) the High Court found that it was unnecessary for the court to make a specific determination on the position of the fifth and sixth respondents. For the avoidance of doubt, the High Court noted that the appellant's own witness (PW1) conceded under cross-examination that the fifth and sixth respondents were not the appropriate authorities to consider a price increase and that only the first respondent possessed such authority. This remains a matter of privity between the contracting parties.

A **Issues Raised By The Appellant At The Court Of Appeal**

[18] Aggrieved by the decision of the High Court, the appellant filed this present appeal that is again founded on the three primary causes of action. These three primary causes of action form the main issues for the Court of Appeal's determination which will be dealt below.

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[19] At the core of the appellant's grievance is that the appellant was unfairly denied a price increase for its footway cleansing services for 18 years, when other similar contractors received a price increase post-privatisation.

C *Issue 1: Claim Under s. 71 Of The Contracts Act 1950 And/Or Quantum Meruit*

[20] The appellant argued that the respondents, in particular the first respondent had been unjustly enriched by the appellant's services. Hence, it was contended that even though there is no direct contract between the appellant and the respondents, the respondents are obligated to pay

D reasonable compensation to the appellant.

[21] In support of this contention, the appellant relied on s. 71 of the Contracts Act 1950 as reproduced below:

> 71. Obligation of person enjoying benefit of non-gratuitous act
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> E Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

F **[22]** To elucidate this provision, the appellant cited the case of *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002, which held that s. 71 of the Contracts Act 1950 is a statutory embodiment of *quantum meruit* ("the amount one deserves") and that the Government can be liable under it even without privity of contract. In *Tanjung Teras Sdn Bhd* (*supra*), the

G Government of Malaysia was found liable for the works carried out by the appellant sub-contractor despite having no contractual relationship with that sub-contractor pursuant to s. 71 of the Contracts Act 1950.

[23] According to the appellant, this establishes that the Government of Malaysia, as the first respondent in this appeal, is not immune from a claim

H under s. 71 of the Contracts Act 1950 by a party with whom it has no contractual relationship, such as the appellant, Gulam Wawasan. See also: *GDP Architects Sdn Bhd v. Universiti Teknologi Mara* [2016] CLJU 1321; [2016] 1 LNS 1321 where a "robust approach" in applying s. 71 of the Contracts Act 1950, recognise that the ultimate beneficiary of the work was

I the Government.

[24] The appellant contended that it is unrealistic to claim only AFSB benefited. It was submitted that the real beneficiaries are the public and the Government of Malaysia, which assumed executive authority over these services *via* the Act 672. Moreover, PW3's testimony is cited to show sixth respondent is a Federal statutory body funded by the first respondent.

[25] It was argued that all elements from *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] CLJU 161; [1967] 1 LNS 161; [1967] 2 MLJ 118, are satisfied, and the first respondent's retention of a benefit at 2005 rates despite 18 years of inflation is "unjust" under principles from *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441. Moreover, the appellant stated that PW1's testimony shows the appellant incurred significant expenses (loans of RM5.5m) based on the legitimate expectation of a price increase.

[26] According to the appellant, the footway cleansing services are within the scope of the concession agreement (citing Recital C, Appendix V, and the definition of "public roads" in Act 672) and that D4/DW1 admitted under cross-examination that the appellant's contract is an "executed contract" under cl. 24.1.1 of the concession agreement.

[27] The appellant reiterated that liability under s. 71 of the Contracts Act 1950 is not based on contract but on equitable principles to prevent unjust enrichment (See: *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* (*supra*)). Therefore, the appellant challenged the High Court's finding that AFSB was the "immediate party" that benefited when the first respondent is the actual ultimate beneficiary. The appellant submitted that this claim is for the increased rate that they were entitled to and not the existing rate they were paid.

Issue 2: Unfair Discrimination Under art. 8(2) Of The Federal Constitution

[28] Article 8(2) of the Federal Constitution provides:

> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[29] It was argued that the respondents discriminated against the appellant by granting price increases to all other contractors providing similar public cleansing services but denying one to the appellant, without any intelligible justification.

[30] The Court of Appeal in *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225; [1997] 1 MLJ 241 laid out the legal test. The three elements of actionable unfair discrimination are: (i) discrimination, (ii) unfairness, (iii) resultant harm. In this regard, the appellant stated that this is a case of "equals being treated unequally" as the appellant was discriminated amongst the other contractors whose contracts were novated pursuant to Act 672 and the concession agreement. The appellant argued the discrimination is unfair as there was no credible basis to deny the increase, especially after it was approved by the Director General of the third respondent on 1 August 2014. The appellant proceeded to highlight the pecuniary harm of being caught at the 2005 rates while others got increases of 300-515%. PW1 and PW2 had testified that the appellant's effective rate was reduced by 10% after novation to cover AFSB's management fee.

[31] Clause 24.1.1(b) of the concession agreement provides novated contractors a rate "not less than" the pre-privatisation rate, a guarantee the appellant did not receive. It was thus submitted by the appellant that the High Court was erroneous in finding that the appellant was "comfortable with the rates it receives" without regards to the years of correspondence and appeals by the appellant that proves the opposite.

Issue 3: Misfeasance/Nonfeasance In Public Office Against The Fourth Respondent (Dato' Sri Mohammad bin Mentek)

[32] The main argument of the appellant is that the fourth respondent as a senior public officer had deliberately and unlawfully failed to perform his duty to table the appellant's price increase to the Cabinet for consideration and approval. The appellant contended that the fourth respondent had committed the tort of misfeasance in public office. This is because the fourth respondent had abused his public power or authority; he either knew that he was abusing his public power or authority, or was recklessly indifferent as to the limits of their public power or authority; and he acted either (by way of ignoring and/or actively) with the intention of harming the appellant, or with the knowledge of the probability of harming the appellant, or reckless indifference to the probability of harming the appellant. (See: *Tony Pua Kiam Wee v. Kerajaan Malaysia & Another Appeal* [2019] 1 CLJ 337; [2019] 1 MLJ 1).

[33] In relation to the abuse of power or the omission of the fourth respondent, the appellant submitted that his key failure was never submitting the required memorandum to the Cabinet, as resolved in the 29 March 2017 meeting which he admitted under cross-examination.

[34] It was submitted the fourth respondent had knowledge/recklessness as he was involved in meetings and was aware the appellant was the only contractor which did not get an increase in the rates. The fourth respondent admitted a duty to investigate the disparity but failed to do so.

[35] The fourth respondent's inaction caused an eight-year delay, which was submitted to directly cause harm to the appellant. The appellant, thus submitted that this is intent/reckless indifference to harm. It was also argued that the fourth respondent was insubordinate in ignoring direct minutes from the Prime Minister (*eg*, "tidak perlu bawa jemaah Menteri" on 30 March 2018) and failing to reply to him. The fourth respondent had admitted during trial that the memorandum was never submitted to the Cabinet for approval.

[36] Reference was also made by the appellant to the case of *Odhavji Estate v. Woodhouse* [2003] 3 SCR 263 to argue that a deliberate failure to perform a statutory duty can constitute misfeasance.

[37] It is also the appellant's contention that the first respondent is vicariously liable for the fourth respondent's actions under s. 5 of the Government Proceedings Act 1956.

Ancillary Issue Raised By The Appellant: Limitation Period

[38] On this issue, the appellant submitted that the action is not time-barred because (i) the wrong is a continuing one, and (ii) the cause of action only crystallised in April/May 2019 when the Ministry formally refused the claim. As the conduct of the respondents are a "continuing wrong", it was submitted that time does not start to run until the wrong ceases.

[39] Alternatively, the appellant argued that the cause of action only became complete with the respondent's definitive rejection letter dated 26 April 2019. The suit was filed on 8 August 2019, within the 36-month limit under the Public Authorities Protection Act 1948. In support of this contention that limitation laws do not apply to continuing breaches of constitutional rights, the case of *Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors* [2014] 4 CLJ 393; [2014] 3 MLJ 661 was cited.

Submissions By The Respondents (The First Respondent To Fourth Respondents)

Issue 1: On Privity Of Contract And Lack Of Nexus

[40] The respondents' fundamental argument is this. There is no contractual relationship, or "privity", between the appellant and the first to fourth respondents. The appellant's contractual relationship is solely with AFSB. The appellant's original contract with DBKL was novated to AFSB *via* a letter of award dated 1 September 2011. This novation extinguished the old contract and created a new one exclusively with AFSB.

[41] It was argued that the concession agreement dated 19 September 2011 is a separate contract between the first respondent, the sixth respondent, and AFSB. A specific "no privity" clause (cl. 24.4) in this agreement expressly states it does not create a contractual relationship between the first respondent and any of AFSB's contractors or suppliers. All payments for the

appellant's services were made by AFSB, not by any of the respondents. There were no outstanding arrears, demonstrating the commercial relationship was solely with AFSB.

[42] It was submitted that the corporate veil should not be lifted, as there was no evidence of fraud or that the corporate structure was a sham. Each entity (DBKL, AFSB, and the first respondent is a separate legal person).

[43] In response to the appellant's claim, the respondent contended the appellant's attempt to sue the Government of Malaysia directly is fundamentally flawed as they are a "stranger" to the concession agreement. Any grievances over payment rates should have been pursued against AFSB, with whom they have a direct contract. (See: *Salomon v. A Salomon & Co Ltd* [1897] AC 22; *Suwiri Sdn Bhd v. Government Of The State Of Sabah* [2008] 1 CLJ 123; [2008] 1 MLJ 743; *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd* [2014] 5 CLJ 533; [2015] 1 MLJ 284).

Issue 2: On Quantum Meruit And s. 71 Of The Contracts Act 1950

[44] The respondents' core argument is that a claim for *quantum meruit* under s. 71 of the Contracts Act 1950 cannot succeed because a valid contract governing the payment already exists between the appellant and AFSB. The essential requirement for a s. 71 claim is the absence of a contract. Since the appellant had a binding contract with AFSB, this claim is invalid.

[45] The appellant has been paid the agreed contract sum of RM549,877.77 per month consistently and without any arrears. Therefore, there is no "unjust enrichment" by the respondents. The appellant's own conduct undermines their claim. They continued performing the contract at the same rate even after it matured in 2018 and, in 2022, applied to AFSB to clean additional roads at the same existing rate, proving they found it remunerative. The internal letter from the third respondent dated 1 August 2014 suggesting a rate increase was suspended by another internal letter dated 17 November 2014 and was never intended for nor addressed to the appellant. It was an internal document between the third respondent and the sixth respondent.

[46] The case of *Tanjung Teras Sdn Bhd* (*supra*), relied on by the appellant, is distinguishable because in that case, the plaintiff was never paid for its work. Here, the facts are that the appellant was paid in full according to its own agreement.

[47] The respondents argue that the claim under *quantum meruit* is misconceived. The appellant was fully compensated according to the contract it voluntarily signed with AFSB. The first respondent paid AFSB a higher sum (RM610,975.30) as per the concession agreement, but the difference is a matter for the AFSB-appellant contract, not the Government-

appellant relationship. See: *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563; *Siow Wong Fatt v. Susur Rotan Mining Ltd* [1967] CLJU 161; [1967] 1 LNS 161.

Issue 3: On Misfeasance In Public Office (Against The Fourth Respondent)

[48] The respondents' contention is that the appellant failed to prove the essential elements of the tort of misfeasance in public office, particularly the crucial element of bad faith or targeted malice on the part of the fourth respondent. The tort requires an intentional abuse of power with either the intention to injure the plaintiff or reckless indifference to the probability of harm.

[49] It was submitted that the fourth respondent's actions were not malicious but were based on adhering to government financial procedures and the concession agreement. The fourth respondent advised that any rate increase would require Cabinet approval as it involved public funds and was outside the Director General's authority.

[50] It was argued that the fourth respondent did take action by chairing meetings (*eg*, meeting on 3 November 2015) to discuss the issue and providing written feedback to the Prime Minister's office. Moreover, under cross-examination the appellant's own witnesses (PW1, PW2, PW3, PW4) could not identify any personal gain or malicious intent undermining the fourth respondent's actions.

[51] Pertaining to the Prime Minister's minutes ("Untuk pertimbangan" - For consideration), this was submitted to be directives for review, not absolute, unconditional orders. A public officer has a duty to advise on the legality and procedure of implementing such directives.

[52] With regard to the doctrine of legitimate expectation, the respondents submitted that it does not apply in this circumstance as it is a public law concept, and this is a dispute rooted in private contract law.

[53] Failure to immediately comply with the Prime Minister's minutes, after advising on the proper legal and financial channels, does not constitute the "outrageous conduct" or "bad faith" required for this tort. See: *Three Rivers District Council v. Bank Of England (No 3)* [2003] 2 AC 1; *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; *GPQ Sdn Bhd v. Constant View Sdn Bhd* [2017] CLJU 821; [2017] 1 LNS 821; [2017] 6 MLJ 728.

Issue 4: Unfair Discrimination

[54] According to the respondents, the claim under art. 8(2) of the Federal Constitution fails because this is a matter of private contract law, not public law discrimination. The appellant freely negotiated and agreed to its contract terms with AFSB. Article 8(2) of the Federal Constitution prohibits

discrimination by a "public authority" in law or public administration. The setting of a contract price through private negotiation with AFSB does not fall under this umbrella.

[55] Article 8(5) of the Federal Constitution states that it does not invalidate any provision regulating "personal law", which includes laws governing private contractual relations. The appellant voluntarily signed the contract with AFSB with full knowledge of the rate and the option to decline. Their continued performance confirms the rate was acceptable. Hence, it was submitted by the respondent that the appellant cannot compare itself to contractors in Putrajaya as it has no knowledge of the specifics, scope, or terms of those different contracts.

[56] According to the respondents, the difference in rates is a commercial outcome of different contracts, not an act of unfair discrimination by the state. The appellant's remedy, if any, lay in negotiating with its immediate contractual partner, AFSB. (See: *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara Malaysia & Ors, Malaysia & Ors* [2021] 6 CLJ 471).

Issue 5: Standard Of Proof

[57] The respondents argued that the appellant failed to prove any of its claims on a balance of probabilities, the standard of proof in civil cases. The appellant did not provide sufficient evidence to establish a direct contractual link with the respondents, unjust enrichment, bad faith, or discrimination. The evidence presented, including the appellant's own conduct, supported the respondents' case that this was a straightforward contractual dispute with AFSB that had been fully performed. The learned Judicial Commissioner was correct in his finding that the appellant did not discharge its burden of proof. (See: *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584).

Submissions By The Respondents (The Fifth Respondent And Sixth Respondent)

[58] The fifth respondent and the sixth respondent commenced by stating that their position in this appeal is identical to that of the first to fourth respondents. The fifth and sixth respondents formally adopted the submissions of the first to fourth respondents in totality.

[59] It is the fifth and sixth respondents' primary and distinct argument that centres on the lack of legal authority to approve the price increase claimed by the appellant.

[60] In this regard, the fifth and sixth respondents emphasised that the learned Judicial Commissioner had explicitly agreed with this point. The learned Judicial Commissioner noted that the appellant's own witness (PW1) acknowledged under cross-examination that only the first respondent had the authority to approve a price. The learned Judicial Commissioner also found that the fifth and sixth respondents did not have the authority to do so.

[61] In support of this contention, the fifth and sixth respondents reproduced the trial transcript. The record shows PW1 agreeing with the following statements:

(i) the first, second and third respondents were responsible for new pricing, not the fifth and sixth respondent;

(ii) the fifth and sixth respondents did not have the authority to determine any new price for the appellant; and

(iii) only the first respondent had the authority to approve any price increase.

The Fifth And Sixth Respondents Ground Their Lack Of Authority In Law Based On The Solid Waste And Public Cleansing Management Act 2007 (Act 672)

[62] Pertaining to the contention that the fifth and sixth respondents lacked the requisite authority founded on the Act 672, the fifth and sixth respondents relied on subs. 19(1) of Act 672, which defines the functions of the sixth respondent.

[63] The main functions of the sixth respondent are related to advisory and executive roles. In this regard, the sixth respondent is tasked to "recommend" policies and strategies to the Federal Government; "implement" policies and measures "decided by the Federal Government" and "supervise compliance" with standards set by the first respondent, among others.

[64] It was submitted by the fifth and sixth respondents that this statutory framework confirms that the sixth respondent is an implementing body, not the ultimate decision-maker. The final authority rests solely with the first respondent, the Government of Malaysia.

Response To Appellant's Claim: The Unapproved Rate

[65] In response to the appellant's claim pertaining to the unapproved rate, the fifth and sixth respondents argued that there was no privity of contract between parties. There is no contractual privity as there was no contract between the appellant and the fifth and sixth respondents. The appellant's contract was with AFSB.

[66] It was contended that this is a fatal flaw as the appellant is not claiming payment at the old, agreed-upon rate. Instead, the appellant is making a claim over RM83 million based on a new, higher rate that was never approved by the only entity with the power to approve it, the first respondent.

[67] The fifth and sixth respondents contended that the appellant's act of seeking payment at an unapproved rate is like "putting the cart before the horse". Approval must come first; a claim for payment cannot create the approval.

Response To Appellant's Relied-Upon Evidence

[68] The appellant may point to a letter from the third respondent dated 1 August 2014 as implying approval. In response, the fifth and sixth respondents argued that this letter was never addressed to the appellant. Moreover, this letter of 1 August 2014 was immediately superseded by another letter from the third respondent dated 17 November 2014, which suspended the previous decision.

[69] It was submitted that at the 3 November 2015 meeting, it was officially decided that:

(i) the appellant's work scope was not included in the main concession agreement;

(ii) the third respondent did not have the power to increase rates; and

(iii) any claim for a rate increase could only be made in 2018, as per the concession agreement's review clause.

Analysis

[70] The appellant's grounds of appeal at the Court of Appeal can be reduced to the following:

(i) section 71 of the Contracts Act 1950 and/or *quantum meruit*;

(ii) unfair discrimination under art. 8(2) of the Federal Constitution; and

(iii) misfeasance/nonfeasance in public office.

[71] We will now consider the grounds of appeal put forth by the appellant.

Section 71 Of The Contracts Act 1950 And/Or Quantum Meruit

[72] The appellant submitted that the learned Judicial Commissioner had erred in dismissing the claim under s. 71 of the Contracts Act 1950 and/or *quantum meruit*. The claim is based on works carried out for which the appellant contends it has not received adequate compensation. The shortfall in payment stems from the failure to pay the appellant the increased contractual rate owed for its cleaning services of public footways under the letter of award.

[73] In this regard, s. 71 of the Contracts Act 1950 reads:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[74] The appellant submitted that s. 71 of the Contracts Act 1950 has been interpreted by the courts. The Court of Appeal in *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002 held that s. 71 of the Contracts Act,

1950 is the "statutory embodiment of the common law principle of *quantum meruit*, which provides for a just compensation as the measure of the work done as opposed to contractual damages". (See also: *GDP Architects Sdn Bhd v. Universiti Teknologi MARA* [2016] CLJU 1321; [2016] 1 LNS 1321).

[75] The facts in this case disclose that the concession agreement is between the first respondent; the sixth respondent and AFSB. The appellant did not dispute that there is no contractual relationship between the first respondent and the appellant, AFSB had sub-contracted the footways cleaning services of Kuala Lumpur to the appellant. The appellant conceded that the appellant does not have a contractual claim against the first respondent therefore. This is because the appellant is not a party to the concession agreement. Hence, the appellant had not brought a claim for breach of contract.

[76] Nonetheless, the appellant argues that the appellant has a claim against the first respondent under s. 71 of the Contracts Act 1950. This is due to the fact that the footways and cleaning services carried out by the appellant eventually will benefit the first respondent. It was further submitted that the first respondent has a duty to exercise executive authority over public cleansing services following the coming into effect of Act 672. According to the appellant the duty and functions under the Act 672 lie with the first respondent, the second respondent, the third respondent and the sixth respondent.

[77] It was contended by the appellant that the juristic basis behind s. 71 of the Contracts Act 1950 is on the equitable principle of restitution, good conscience, and prevention of unjust enrichment. In this regard, the principles of unjust enrichment are stated by the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 where Azahar Mohamed FCJ (as His Lordship then was) stated the following:

> [128] The most important question which we must now asked is whether it is unjust for the Appellant to retain to the benefit (the unjust question). The English approach to the unjust question is to ascertain an unjust factor such as, for example, mistake or failure of consideration. This differs with the civilian approach to the unjust question which consider whether there is a lack of juristic basis. Goff & Jones on *The Law of Unjust Enrichment*, para 1-11, explained these two approaches as follows:
>
> > Many civilian and mixed law systems have a law of unjustified enrichment, under which a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense and that there was no legal ground for the defendant's enrichment. Under these systems a defendant can escape restitutionary liability by showing that there was a legal ground for his enrichment, for example because the claimant was required to benefit the defendant by statute or by contract. The reason why there is no liability in

these circumstances is that the defendants enrichment is not unjustified and so the claimant has no *prima facie* right to restitution.

The English law of unjust enrichment frequently produces the same results as the law of civilian and mixed law systems, but it works in a different way. Under English law, a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. For example, a claimant will have a *prima facie* right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or on a basis that fails. Nevertheless, the defendant can escape liability if another legal rule entitles him to keep the benefit, and this rule overrides the rule generated by the law of unjust enrichment which entitles the overrides the rule generated by the law of unjust enrichment which entitles the defendant to restitution. For example, a claimant may have paid money to a defendant by mistake, but even so, the payment may be irrecoverable if the claimant was required to pay the money by a statute or by a contract previously entered by the parties. Although the claimant would otherwise have a claim in unjust enrichment, the defendant's enrichment is justified by the statute or contract.

[129] We would adopt 'the absence of basis' (to borrow the term used by Goff & Jones on *The Law of Unjust Enrichment* para 1-19) approach of the civilian and mixed law systems for the reason that, in our view, it would produce a fairer outcome. Applying this approach, the Appellant can escape restitutionary liability by showing that there was a legal ground for receiving an enormously enhanced and improved asset in the form of the business of a shopping mall. The important point to note here is that the defendant was not required to benefit the Appellant by legislations or by contract. In our judgment the reason why there is liability in these circumstances is that the Appellant's enrichment is unjustified and that there is no legal ground for the Appellant to claim and enjoy the full commercial value of the mall. Therefore, the defendant has a *prima facie* right to restitution.

[130] On the factual matrix of the present case, in our judgment, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the Appellant is at the same time made richer by the defendant's loss by the same amount. On that note, the point to make here is this. This sense of injustice at the defendant's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. The Appellant should not be allowed to reap the windfall at the expense of the defendant. The defendant lawfully constructed the mall on the land not intending to do so gratuitously with the Appellant enjoying its benefit. On this basis, it warrants judicial intervention as a legal response triggered by an unjust enrichment in the fact situation of the present case.

[131] To conclude, we hold that the defendant had made out a cause of action in unjust enrichment in that the Appellant has been enriched, that this enrichment was gained at the defendant's expense, and that the Appellant's enrichment was unjust.

[78] The appellant submitted that by applying the aforementioned principles to the instant case, it is evident that the first respondent has benefitted from the services rendered by appellant since the coming into force of the Act 672, which vested executive authority in the first respondent over, among others, the cleansing of public footways in Kuala Lumpur. The evidence establishes that the appellant had continuously performed these services for the past 18 years without interruption. However, the first respondent had continued to enjoy these services at the 2005 contract rate agreed with DBKL, thereby taking advantage of a fixed price while the appellant bears the escalating costs of performing the services due to inflation. The retention of this additional benefit without corresponding compensation to the appellant it was argued to be unjust, giving rise to liability on the part of the first respondent under s. 71 of the Contracts Act 1950.

[79] The learned Senior Federal Counsel for the first to fourth respondents argued that the appellant contends that it is entitled to claim payment from the first to fourth respondent on the principle of *quantum meruit*, relying on the decision in *Tanjung Teras* (*supra*). However, the first to fourth respondents argue that the *Tanjung Teras* (*supra*) case is inapplicable and irrelevant to the present matter. The law governing claims based on the *quantum meruit* principle is clear, as set out under s. 71 of the Contracts Act 1950.

[80] The issue for determination is whether the appellant has satisfied the requirements under s. 71 of the Contracts Act 1950. The first to fourth respondents submit that the claim based on *quantum meruit* fails for the following reasons:

(i) the appellant is not a party to the concession agreement;

(ii) the appellant's works were paid for pursuant to the agreement between the appellant and AFSB;

(iii) the letter dated 1 August 2014 was not addressed to the appellant and is an internal document;

(iv) there is no valid expectation arising from the letter dated 1 August 2014 upon which the appellant can rely;

(v) the promise of a price increase was made by PW5, not by the respondents (see testimony of PW1), and this was not proven through PW5, who testified;

(vi) the appellant continued to claim the same rate for the contract extension from AFSB on 31 August 2018 and onwards, after the contract expired on the same date (see testimony of PW1); and

(vii) the appellant again sought the same rate in its 2022 application to expand the road maintenance scope (see testimony of PW1).

[81] Accordingly, it was submitted that the *quantum meruit* claim or a claim under s. 71 of the Contracts Act 1950 by the appellant cannot be considered as all works carried out have already been paid for in accordance with the parties' respective agreements. Hence, the learned trial judge was not in error in reaching the same conclusion based on the evidence of witnesses PW1 and PW5.

[82] The fifth and sixth respondents submitted that the fifth and sixth respondents were adopting the submissions of the first to fourth respondents.

[83] Therefore, the submissions of the fifth and sixth respondents will be confined to the role of the fifth and sixth respondents. It is the fifth and sixth respondents' case that they are not the authority to decide on the pricing which is under the ambit and power of the first respondent. Reference was made to the grounds of judgment of the learned Judicial Commissioner which stated at para. 62 that PW1 had acknowledged under cross-examination that the fifth and sixth respondents were not the appropriate authorities to consider the price increase which is under the purview of the first respondent.

[84] Learned counsel for the fifth and sixth respondents brought this court's attention to s. 17 of Act 672 which reads:

Fungsi Perbadanan

17(1) Perbadanan hendaklah mempunyai segala fungsi yang dikenakan ke atasnya di bawah undang-undang pengurusan sisa pepejal dan pembersihan awam dan hendaklah juga mempunyai fungsi-fungsi yang berikut:

(a) untuk mengesyorkan dasar, rancangan dan strategi termasuk skim berkenaan dengan perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam kepada Kerajaan Persekutuan;

(b) untuk melaksanakan apa-apa dasar, rancangan dan strategi termasuklah skim yang diputuskan oleh Kerajaan Persekutuan;

(c) untuk melaksanakan langkah-langkah yang diputuskan oleh Kerajaan Persekutuan bagi memajukan mana-mana perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam sedia ada;

(d) untuk mengesyorkan standard, spesifikasi dan tataamalan yang berhubungan dengan apa-apa aspek perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam kepada Kerajaan Persekutuan;

(e) untuk mengawasi pematuhan standard, spesifikasi dan tataamalan yang berhubungan dengan apa-apa aspek perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam yang ditetapkan oleh Kerajaan Persekutuan;

(f) untuk melaksanakan dan menguatkuasakan undangundang pengurusan sisa pepejal dan pembersihan awam dan mengesyorkan pembaharuan kepada undang-undang itu kepada Kerajaan Persekutuan;

(g) untuk memastikan bahawa fungsi dan obligasi mana-mana orang yang menjalankan perkhidmatan pengurusan sisa pepejal atau perkhidmatan pengurusan pembersihan awam dijalankan dengan sepatutnya;

(h) untuk menambah usaha bersepadu ke arah peningkatan kecekapan pengendalian perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam;

(i) untuk melaksanakan langkah untuk menggalakkan penyertaan awam dan mempertingkatkan kesedaran awam mengenai perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam;

(j) untuk merumuskan dan melaksanakan pembangunan dan pembiayaan sumber manusia dan program kerjasama bagi pelaksanaan fungsi Perbadanan dengan patut dan berkesan;

(k) untuk bekerjasama dengan mana-mana pertubuhan perbadanan atau agensi kerajaan bagi maksud melaksanakan fungsi Perbadanan;

(l) untuk menggunakan semua harta alih dan tak alih Perbadanan mengikut apa-apa cara yang difikirkan suai manfaat oleh Perbadanan termasuklah menggadaikan harta itu bagi mendapatkan pinjaman;

(m) untuk menggalakkan, mempromosi, memudahkan dan merangsang pertumbuhan perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam melalui pelbagai cara termasuklah mengatur penjalanan penyelidikan, penilaian, kajian dan khidmat nasihat;

(n) untuk mengekalkan dan memperbaiki standard dan tahap perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam;

(o) untuk menubuhkan institusi, pusat dan bengkel bagi menjalankan penyelidikan dan aktiviti-aktiviti lain yang perlu bagi atau berhubung dengan pembangunan perkhidmatan pengurusan sisa pepejal dan perkhidmatan pengurusan pembersihan awam;

A (p) untuk menentukan dan mengenakan fi, caj atau bayaran lain bagi perkhidmatan yang diberikan oleh Perbadanan; dan

(q) untuk menjalankan apa-apa fungsi yang diberikan kepadanya di bawah undang-undang pengurusan sisa pepejal dan pembersihan awam.

B **[85]** In this regard, founded on the clear and unambiguous provision of s. 17 of Act 672 which provides for the functions of the sixth respondent, we agree to the submissions of learned counsel for the fifth and sixth respondents that the scope of duty or function of the fifth and sixth respondents are limited by the Act 672. Hence, the fifth and sixth C respondents carry out the policies of the first respondent.

[86] What this entails is that the fifth and sixth respondents are not autonomous and are required to obtain the first respondent's approval for any increase in price. In other words, it is not for the fifth and sixth respondents to decide on any price increase for the services rendered. This is particularly D so when the appellant is claiming for services rendered based on a rate which has not been approved.

[87] In relation to the first to fourth respondents, the appellant has relied on s. 71 of the Contracts Act 1950 and/or *quantum meruit*. The facts of this E instant appeal are that there are no outstanding payments from AFSB to the appellant. All payments have been made regularly up to the present day. This is distinguishable from the case of *Tanjung Teras* (*supra*), where the payments made by the respondent did not cover the works performed by the appellant in that case. This must be distinguished from the present appeal before this court, where the payments made by the respondents to AFSB have covered F the works carried out by the appellant, which remains proportionate and substantiated by the evidence.

[88] We find the evidence shows that all payments were made either by AFSB or DBKL themselves, to whom the principle of the "corporate veil" applies, and as a consequence do not bind the first to fourth respondents in G this case. DBKL and AFSB, being distinct and separate entities, are the ones who had received the benefits from the cleaning works performed by the appellant.

[89] Moreover, we find it implausible to suggest that every work H performed by any contractor in the country automatically confers a benefit upon the first respondent. Such an approach would be dangerous, as accepting it would effectively place the first respondent in a position of being deemed to have derived benefits, and thereby to be indirectly liable, for any and all improvements made through works carried out in the country. This I would, in our view, lead to floodgates of litigation against the first respondent, when it is not the first respondent who had derived such benefit from the appellant's services.

[90] For these reasons, we are satisfied and find that this ground of appeal, namely s. 71 of the Contract Act 1950 and/or *quantum meruit*, does not have merit.

Unfair Discrimination Under Article 8(2) Of The Federal Constitution

[91] The appellant submitted that the learned trial Judicial Commissioner had erred in failing to hold that the appellant's rights under art. 8(2) of the Federal Constitution were breached and that there is no element of unfairness.

[92] The appellant cited the Court of Appeal case of *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225; [1997] 1 MLJ 241 which held that the following elements must be established for unfair discrimination to be actionable:

(i) there must be some form of discrimination;

(ii) the discrimination must be unfair; and

(iii) there must be resultant harm or injury.

[93] The appellant submitted that it was singled out for denial of a price increase despite performing the same category of services as other contractors novated under the concession agreement, all of whom received increased rates. This is a case where "equals are treated unequally".

[94] Learned counsel for the appellant argued that the discrimination was unjust and without any valid justification, especially given that the Director General of the third respondent had already approved the rate increase by letter dated 1 August 2014. The appellant incurred financial losses as it was compelled to continue operating under the outdated 2005 rates, which were further reduced by 10% due to AFSB's service fee, following the appellant's contract with AFSB after the novation, as explained by PW1 and PW2.

[95] The inequitable treatment of the appellant, it was submitted, is further demonstrated by cl. 24.1.1(b) of the concession agreement, which expressly guaranteed that no contractor would receive a lower rate following the novation.

[96] In response, the first to fourth respondents submitted that they had never engaged in any act of discrimination against the appellant. At all material times, the concession agreement was between the first respondent, AFSB, and the sixth respondent. The appellant only entered into an agreement through a letter of award with AFSB.

[97] Pertaining to the terms for a price review are provided under the concession agreement, cl. 20.5.2 of the concession agreement stipulates that a price increase may only be discussed in the seventh or 14th anniversary year of the concession agreement. Such discussions on price increases are limited to the parties to the concession agreement and do not involve the appellant.

[98] Clause 7 of the letter of award between AFSB and the appellant specifies that the agreed service fee for the cleaning works carried out is RM549,877.77 per month. Clause 7 also provides that this service fee may be revised, either increased or decreased, from time to time if there are any changes to the work area or to the concession agreement itself. To date, the services under the concession agreement and the letter of award continue to operate without any changes to either the work area or the concession agreement itself. Hence, cl. 7 of the letter of award would not be applicable to allow the service fee to be revised.

[99] In this regard, the burden of proof lies on the appellant to demonstrate that the contract or letter of award it voluntarily signed is discriminatory under any provision of the Contracts Act 1950 or the Federal Constitution.

[100] The appellant was fully aware that it was not a party to the concession agreement. If the appellant believed that the letter of award was discriminatory, it should have taken action against AFSB, not the first to fourth respondents. The appellant also knew that the service fee could be increased or decreased if there were any changes to the concession agreement. Therefore, the appellant should have applied to AFSB for any rate revision, as AFSB is a party to the concession agreement.

[101] PW1 agreed that if the disputed service fee had been unreasonable, he could have chosen whether or not to enter into the contract. The first to fourth respondents argue that the fact that the appellant voluntarily agreed to the agreement with AFSB and continued to provide cleaning services indicates that the service fee was reasonable and that no discrimination was committed against the appellant by the first to fourth respondents.

[102] As for the fifth and sixth respondents, as stated earlier, the fifth and sixth respondents adopted the submissions of the first to fourth respondents.

[103] We find that, founded on the facts which are not disputed, at all material times no contract existed between all the respondents and the appellant. Thus, the learned Judicial Commissioner was correct.

[104] The appellant alleges that it was discriminated against because the service fee it received was not the same as the service fee for cleaning works on public footways in Putrajaya. However, we find that the appellant had no knowledge of the agreement relating to the cleaning works in Putrajaya as that agreement was also not produced before the court for proper consideration.

[105] It is our view that it cannot be that the appellant was discriminated against merely because the service fee agreed between the appellant and AFSB (which has been duly and consistently paid without arrears) differs from the service fee for footway cleaning works in Putrajaya.

[106] We find the appellant's argument that the appellant was discriminated against improbable. The service fee received by the appellant was one that it had voluntarily agreed to when it signed the letter of award with AFSB. The contractual terms were mutually agreed upon by both parties under s. 10 of the Contracts Act 1950. How then can the appellant contend that there was discrimination when the subject matter of this appeal, namely the price increase was a matter between the appellant and AFSB which constitutes a matter of personal law not subject to art. 8 of the Federal Constitution.

[107] We find no evidence that the respondents had at any time violated the appellant's constitutional rights under the Federal Constitution. Hence, we are satisfied there is no merit to this ground of appeal.

[108] Moreover, with respect to the rate increases for other companies, we find that such increases were made by AFSB, as reflected in letters dated 15 April 2013. (See: *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 6 CLJ 471).

Misfeasance/Nonfeasance In Public Office

[109] The appellant maintained that the learned Judicial Commissioner had erred when the learned Judicial Commissioner dismissed the appellant's claim for misfeasance/nonfeasance in public office.

[110] In espousal of this ground of misfeasance/nonfeasance, the appellant cited the Federal Court case of *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 2 MLJ 1 which laid down the elements of misfeasance. The elements are:

(i) an abuse of public power or authority;

(ii) by a public officer;

(iii) who either:

  (a) knew that he was abusing his public power or authority; or

  (b) was recklessly indifferent as to the limits of their public power or authority;

(iv) who acted or omitted to act either with:

  (a) the intention of harming the appellant (targeted malice); or

  (b) with the knowledge of the probability of harming the appellant, or with reckless indifference to the probability of harming the appellant or a class of persons that included the appellant.

[111] The appellant submitted that it is undisputed the fourth respondent is a "public officer" within art. 132(1)(c) of the Federal Constitution. The abuse of public power or authority that founds the misfeasance/nonfeasance claim is his omission to act to ensure the appellant received increased contractual rates.

[112] According to the appellant, the evidence supporting the appellant's entitlement to increased rates includes a series of letters and official communications showing consistent approval and endorsement from various authorities as follows:

(i) AFSB's support (10 January 2013 and 25 June 2013): AFSB supported the appellant's request for higher rates and applied to the Director General of the third respondent for a new rate for the appellant's footway cleansing services in Kuala Lumpur;

(ii) approval by the third respondent (1 August 2014): The Director General confirmed that the appellant's works were outside the concession agreement and set new rates effective from 1 August 2014;

(iii) Prime Minister's intervention (2014 to 2018): Following the third respondent's deferral, the appellant appealed to the Prime Minister, who issued multiple directives between 2014 and 2018 instructing that the new rates be implemented "like other companies" and approved "without Cabinet referral"; and

(iv) ministerial confirmation (2017): A meeting chaired by the Minister of Urban Wellbeing agreed to refer the appellant's rate increase to the Cabinet based on the Director General's earlier approval.

[113] It is the appellant's case that despite these clear directions, the fourth respondent failed to refer the matter to the Cabinet for approval. The fourth respondent admitted during trial and cross-examination that neither he nor his Ministry submitted the required memorandum. This, according to the appellant meant that the fourth respondent had deliberately failed to act as a public officer. (See: *Northern Territory Of Australia v. Mengel* [1995] 185 CLR 301, *Odhavji Estate v. Woodhouse* [2003] 3 SCR 263 and *Three Rivers District Council & Others v. Bank of England* [2000] 3 All ER 1; where the courts held the inaction, omission or failure to act of a public officer is actionable under the tort of misfeasance and/or nonfeasance in public office).

[114] It was contended that in *Three Rivers* (*supra*), the three elements are: (i) the circumstances are such that the discretion whether to act can only be exercised in one way so that there is effectively a duty to act; (ii) the official appreciates this but nevertheless makes a conscious decision not to act; and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury will be the natural and probable consequence of his failure to act, are all clearly satisfied on the facts, thereby establishing liability for misfeasance against the fourth respondent.

[115] The appellant argued that the fourth respondent had only one lawful duty, which was to refer the appellant's application for a price increase to the Cabinet. However, the fourth respondent failed to do so despite repeated directives from the then Prime Minister. Instead, he delayed action and only issued a late response on 3 March 2019 to the new Prime Minister after the appellant complained to the Ministry of Finance. The fourth respondent, it was submitted, knowingly chose not to act, fully aware that the appellant was the only contractor denied revised rates for public cleansing services. His involvement in meetings and correspondence shows he was well-informed of the issue. Alternatively, it is argued that the fourth respondent was recklessly indifferent to the appellant's unfair treatment.

[116] The first to fourth respondents argued that for a misfeasance claim to succeed, the elements set out in the *Three Rivers* (*supra*) must be satisfied. It is undisputed that the fourth respondent is a public officer exercising public powers. However, it was submitted that the element of malice cannot be established.

[117] In this regard, the learned Senior Federal Counsel submitted that the decision made by the fourth respondent was based on existing laws and regulations which were still in force. The appellant has not proven any element of malice on the part of the fourth respondent directed towards the appellant.

[118] During cross-examination of the appellant's witness, PW1, it was asserted that the fourth respondent had acted maliciously. However, when asked what the alleged malice or benefit to the fourth respondent was, PW1 admitted he was unsure.

[119] Furthermore, during re-examination, PW1 testified that the alleged misconduct by the fourth respondent consisted of delaying payment, failing to confirm meeting minutes, and ignoring the instructions of the Honourable Prime Minister.

[120] In addition, PW2 agreed that advising the Honourable Prime Minister does not amount to disobeying instructions. The fourth respondent's act of advising the Prime Minister was to ensure compliance with prevailing financial regulations. PW3 testified that the alleged misconduct of the fourth respondent was merely the delay in granting the appellant a price increase. Meanwhile, PW4 stated that if there were clear contractual terms, he would follow those terms and would not comply with any instruction contrary to the contract.

[121] Based on the testimonies of the appellant's witnesses, it was submitted that there is no evidence of any malicious act committed by the fourth respondent against the appellant. There was no personal interest or motive to harm the appellant's company. It is submitted that the fourth respondent merely acted in accordance with the concession agreement, which stipulates

that only parties to the concession agreement may apply for price revisions, and that any price increase is subject to treasury instructions and financial regulations requiring Cabinet approval.

[122] Therefore, the fourth respondent contended that the elements in the *Three Rivers* (*supra*) have not been satisfied by the appellant in this appeal. The fourth respondent owed no duty to the appellant in this matter. The appellant was a subcontractor to AFSB, and any contractual price arrangement between them was determined solely by those parties.

[123] In this regard, we find merit in the learned Senior Federal Counsel's submission that "misfeasance in public office" is a tort that can only arise where a public officer, in the performance of his official duties, acts unlawfully which results in a loss. Here, we find that the appellant failed to prove that the act or omission was done intentionally to harm the appellant or with reckless disregard of the likelihood of causing such harm.

[124] There is no evidence to suggest that the fourth respondent engaged in any act of malice towards the appellant. The fourth respondent did not possess any personal interest, ill will, or ulterior motive to cause harm to the appellant or its company. On the contrary, we find that the fourth respondent's actions were undertaken strictly in accordance with the terms of the concession agreement. Under the concession agreement, the right to apply for price revisions is expressly limited to the contracting parties to the concession agreement. The appellant is not a party to the concession agreement. Accordingly, this court finds the fourth respondent's conduct was consistent with his obligations and authority, rather than driven by any improper or malicious intent.

[125] The facts reveal the appellant had written to the then Prime Minister pertaining to the issue of price increase. The appellant's grouse is that the appellant had not been compensated well and equally. The appellant argued that the fourth respondent had not heeded to the instructions of the then Prime Minister in increasing the rate for the cleaning services done by the appellant. This was contended by the appellant to be misfeasance in public office.

[126] In this regard, the learned Judicial Commissioner had found that the appellant had not taken the proper channel in the action of the appellant going directly to the Prime Minister. We agree with the finding of the learned Judicial Commissioner. In the event all contractors who had complaints were to take the complaints up to the Prime Minister, what would happen to the due process? The Prime Minister would be inundated with such requests.

[127] The fact is the appellant does not have a relationship with the Prime Minister. It is evident that parties must always refer to the nature of their contractual relationship when seeking to resolve any disputes. It would be difficult to contend that the Prime Minister's directives are binding on the

respondents, given that there is no privity of contract between the appellant and the first respondent. The first respondent would be put in a position that did not exist. It would be rewriting the contract. The fundamental fact is that the first respondent and/or the fourth respondent does not have the authority or jurisdiction to accede to such a request.

[128] The name of the fourth respondent appeared in the minutes of a letter dated 20 October 2015, which had been sent to him by the Prime Minister's Political Secretary. The minute read: "YBhg Datuk Mohammed Mentek, untuk dilaksanakan pembayaran harga baru mulai September 2012, seperti syarikat-syarikat lain". Following this, the fourth respondent chaired a meeting on 3 November 2015, during which it was decided that any changes to the rates could only be implemented in 2018, as no revisions had been made prior to that date. It was further resolved that any adjustments to the rates must be mutually agreed upon by the parties to the concession agreement. Therefore, it would be inaccurate to assert that the fourth respondent failed to take any action; on the contrary, he did act upon the matter.

[129] In addition, a meeting was held with the Minister, YB Tan Sri Noh Omar, on 29 March 2017, during which it was decided that any proposed rate increase would need to be submitted to the Cabinet, as the appellant's services did not fall within the scope of the concession agreement.

[130] There was also the note from the Prime Minister dated 18 April 2018 which had minuted on the appellant's letter dated 30 March 2018 stating the matter need not be taken up to the Cabinet, which appears to be in tandem with contents of the letter dated 30 March 2018. However, this was followed by the dissolution of Parliament and a general election ensued.

[131] Even when Tun Dr Mahathir bin Mohamad became Prime Minister, the position by the fourth respondent did not alter.

[132] Applying the elements set out in the *Three Rivers* (*supra*) case to the facts of this appeal as elaborated above, we are satisfied that the appellant had not proven the intention of the fourth respondent to injure the appellant. Alternatively, the appellant had also failed to prove the fourth respondent had the knowledge that such injury would be the natural and probable consequence of his failure to act.

[133] It is our considered view that the elements in *Three Rivers* (*supra*) have not been proven by the appellant. It follows therefore that the ground of appeal of misfeasance/nonfeasance must fail. We are satisfied there is no merit in this ground put forth by the appellant.

A

No Appellate Intervention Required

[134] The law on appellate intervention to findings of fact is trite. The decision of the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] MLJU 1469, where the Federal Court held that in applying the "plainly wrong" test, a higher court can overturn a lower court's decision if it finds the lower court's factual findings to be demonstrably incorrect or unreasonable. This test essentially means that an appellate court will only intervene with a lower court's decision if it is so manifestly erroneous that no reasonable judge could have arrived at such a conclusion on the evidence before the court. In short, an appellate court does not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was "plainly wrong".

[135] The "plainly wrong" test is based on the principle that the trial court, having seen and heard the witnesses firsthand, is in a better position to assess credibility and evaluate evidence. As noted by the Federal Court in *Ng Hoo Kui* (*supra*), this acknowledges the trial judge's superior advantage over an appellate court, which relies only on written records.

[136] Applying the "plainly wrong" test to this appeal, this court finds that the Judicial Commissioner had properly evaluated the evidence and applied the law correctly. The appellant's criticisms, in our view, merely reflected disagreement with the trial court's conclusions, not proof that those conclusions were plainly wrong. As emphasised in *Ng Hoo Kui* (*supra*), an appellate court cannot overturn factual findings simply because it disagrees with the trial judge's assessment of the evidence.

Conclusion

[137] For the aforementioned reasons, having considered all the oral and written submissions before us, including all documents filed in court, we are satisfied that the learned Judicial Commissioner's decision was correct in law and fact. He had addressed all the key issues raised by the parties and reached conclusions that were well-supported by the evidence and consistent with established legal principles.

[138] For all the reasons set forth, we unanimously dismiss this appeal with costs. The learned Judicial Commissioner's decision dismissing the appellant's claims against all respondents is affirmed in its entirety. Costs of RM70,000 to be paid by the appellant to the first to fourth respondents and costs of RM50,000 to be paid by the appellant to the fifth and sixth respondents subject to allocator fee.